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No. 96-1507

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LA FUERZA AEREA BOLIVIANA,
An Instrumentality of the
REPUBLIC OF BOLIVIA,
A Foreign State,
Petitioner,

v.

TRANSAERO, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

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93 pp

TABLE OF AUTHORITIES

Page

CASES

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 5
Compania Mexicana de Aviacion, S.A. v. United States Dist. Court, 859 F.2d 1354 (9th Cir. 1988) 6
Drexel Burnham Lambert Group Inc. v. Committee of Receivers, 12 F.3d 317 (2d Cir. 1993), *cert. denied*, 511 U.S. 1069 (1994) 6, 7
Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438 (D.C. Cir. 1990) 5, 6
Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445 (6th Cir. 1988) 6
Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 7
Saudia Arabia v. Nelson, 507 U.S. 349 (1993) 5
Segni v. Commercial Office of Spain, 816 F.2d 344 (7th Cir. 1987) 6
State of Alaska v. United States, 64 F.3d 1352 (9th Cir. 1995) 6
Stena Rederi AB v. Comision de Contratos del Comite, 923 F.2d 380 (5th Cir. 1991) 5
Transaero, Inc. v. La Fuerza Aerea Boliviana, 24 F.3d 457 (2d Cir. 1994) 2
Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 1101 (1995) 3, 6
Transaero, Inc. v. La Fuerza Aerea Boliviana, 38 F.3d 648 (2d Cir. 1994) 2, 3
Tubular Inspectors, Inc. v. Petroleos Mexicanos, 977 F.2d 180 (5th Cir. 1992) 5, 6
Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) . . . 6, 7
Velidor v. L/P/G Benghazi, 653 F.2d 812 (3d Cir. 1981), cert. dismissed, 455 U.S. 929 (1982) 5, 6

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 5

STATUTES AND RULES

28 U.S.C. § 1291 5
28 U.S.C. § 1604 5

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REPLY BRIEF FOR PETITIONER

Petitioner La Fuerza Aerea Boliviana (the Bolivian Air Force) submits this reply in support of its Petition for Writ of Certiorari.

The issue presented by the Bolivian Air Force's Petition for Writ of Certiorari is straightforward: Is a foreign sovereign entitled to interlocutory review of its claim that it is not amenable to suit under the Foreign Sovereign Immunities Act? The answer is equally straightforward: Yes.

In its opposition, Transaero advances two primary arguments in an effort to avoid certiorari. First, it asserts that the Second Circuit has twice denied the Air Force's jurisdictional arguments. See Respondent's Brief in Opposition ("Brief") at 2, 4, 15 & n.1. Second, Transaero contends that interlocutory review is available only for questions of subject matter jurisdiction under the Foreign Sovereign Immunities Act, not for questions of personal jurisdiction. In addition to being wrong, these arguments only highlight the confusion and conflict engendered by the decision below. This Court should grant the writ of certiorari and summarily reverse the Second Circuit.

1. Transaero hinges its argument on the assertion that the Second Circuit has ruled not just once, but twice, that the Eastern District of New York had personal and subject matter jurisdiction over this case under the Foreign Sovereign Immunities Act. See Brief at 2, 4, 15 & n.1. Not true.

Nothing in the Second Circuit's first decision, *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 24 F.3d 457 (2d Cir. 1994), says anything about the district court's personal or subject matter jurisdiction under the Act.[1] To the contrary, the court noted the existence of an issue concerning notice of the suit, but explained that the issue "is now pending in the Circuit Court for the District of Columbia." *Id.* at 459 n.1; see also *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 38 F.3d 648, 649 (2d Cir. 1994).

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[1] The court did affirm the district court's jurisdiction to hear a claim for interest instead of referring the claim to arbitration pursuant to the Eastern District's local rules, see *id.* at 461, but that ruling has nothing to do with jurisdiction or amenability to suit under the Foreign Sovereign Immunities Act.

Similarly, the Second Circuit's second decision, on rehearing and after the "notice" issue had been decided by the D.C. Circuit, explicitly *refused* to rule on jurisdiction: "without expressing any views as to [] the validity of Transaero's service upon BAF in initiating the Eastern District suit . . . we decline to grant the petition for rehearing." *Id.* at 650. As if that were not enough, the court made clear that the issue of amenability to suit remained open when it said, "We need not decide whether BAF is entitled to pursue a new Rule 60(b) motion in the Eastern District, now that the D.C. Circuit has declared the default judgment to be void." *Id.*

Admittedly, the Second Circuit's actions are curious, but not for the reasons Transaero suggests. The Second Circuit's decision is strange because that court and the Eastern District of New York explicitly refused to accord *res judicata* effect to the holding of the D.C. Circuit that the district court lacked personal jurisdiction over the Air Force. See *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1101 (1995). Far from being a reason to deny *certiorari*, as Transaero suggests, see Brief at 9, the Second Circuit's failure to follow the D.C. Circuit's ruling has placed the Air Force in the predicament of simultaneously being entitled to sovereign immunity in the D.C. Circuit, yet forced to undergo further proceedings in the same case in the Second Circuit.[2]

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[2] Notably, Transaero's opposition does not contest that the Air Force is a foreign sovereign within the meaning of the Foreign Sovereign Immunities Act. Thus, Transaero effectively concedes that both the Eastern District of New York and the Second Circuit erred in failing to treat the Air Force as a foreign sovereign entitled to immunity from personal jurisdiction unless and until properly served.

Only one court—the D.C. Circuit—has addressed the jurisdictional issues on the merits. The Second Circuit has refused to follow that decision and has refused even to hear the Air Force's interlocutory appeal on the issue of jurisdiction. This Court should summarily reverse and remand this case to the Second Circuit for a ruling on this issue.

2. Transaero attempts without success to erect a barrier between issues of subject matter jurisdiction and issues of personal jurisdiction under the Foreign Sovereign Immunities Act, and further asserts that the former give rise to interlocutory review, but that the latter do not.[3]

To make this argument at all, Transaero is forced to mischaracterize the decision of the D.C. Circuit as involving merely the issue of service of process. In fact, the D.C. Circuit ruled that the Air Force's claim could be heard on interlocutory review because "denial of a claim of sovereign immunity is an immediately appealable final order." *Id.* at 149-50. In other words, the D.C. Circuit recognized that the Air Force—when it invoked the service requirements of the Foreign Sovereign Immunities Act—was in fact raising a claim of sovereign immunity and that interlocutory review was appropriate. The Second Circuit reached the opposite conclusion with respect to the same claim and created a circuit conflict, which in itself is sufficient reason for this Court to grant the writ.

In fact, the D.C. Circuit was correct, and Transaero's assertions about interlocutory review are wrong. Transaero's purported differentiation between personal and subject matter jurisdiction under the Foreign Sovereign Immunities

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[3] Importantly, Transaero does not even attempt to defend the Second Circuit's ruling that foreign sovereign immunity is only an immunity from judgment. Transaero's silence speaks volumes about the merits of that ruling.

Act exhibits a fundamental misunderstanding of both the structure of the Act and this Court's interpretations of it.

The Foreign Sovereign Immunities Act "comprehensively regulat[es] the amenability of foreign nations to suit in the United States." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). The Act provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States . . . except as provided." 28 U.S.C. § 1604. In interpreting this language, this Court has stressed that "a foreign state is presumptively immune from the jurisdiction of United States courts." *Saudia Arabia v. Nelson*, 507 U.S. 349, 355 (1993). To overcome this immunity, district courts are required, "[a]t the threshold of every action," to make an affirmative determination of personal and subject matter jurisdiction. *Verlinden*, 461 U.S. at 493-94.

The structure of the Act and this Court's decisions make clear, therefore, that both personal *and* subject matter jurisdiction are necessary to overcome a foreign sovereign's immunity to suit and that, conversely, the absence of either subject matter *or* personal jurisdiction means that a foreign sovereign, such as the Air Force, remains immune from suit.

In recognition of this fact, at least six circuits have held that a foreign sovereign's amenability to suit is subject to interlocutory review under 28 U.S.C. § 1291 and the "collateral order" doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).[4] At least four circuits allow

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[4] See *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 442-43 (D.C. Cir. 1990); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 814 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982); *Tubular Inspectors, Inc. v. Petroleos Mexicanos*, 977 F.2d 180 (5th Cir. 1992); *Stena Rederi AB v. Comision de Contratos del Comite*, 923 F.2d 380, 385 (5th Cir. 1991) ("the FSIA 'is an immunity from suit rather than a mere defense to liability; it is effectively lost if a case is

interlocutory appeals on personal jurisdiction.[5] Indeed, even the Second Circuit initially embraced this view before abandoning it in the case at bar. See *Drexel Burnham Lambert Group Inc. v. Committee of Receivers*, 12 F.3d 317, 323-24 (2d Cir. 1993) (granting interlocutory appeal for personal jurisdiction, among other issues, but not for posting of security), *cert. denied*, 511 U.S. 1069 (1994).

With the exception of the decision below, Transaero is unable to cite a single Foreign Sovereign Immunities Act decision to support its view of the difference between personal and subject matter jurisdiction under the Act. The cases cited by Transaero deal primarily with the waiver of the United States' own sovereign immunity in its own courts. Brief at 11-12. But as one of those cases expressly notes, that issue presents quite a different context from this case, which involves a sovereign's amenability to suit in a *foreign* state's courts. See *State of Alaska v. United States*, 64 F.3d 1352, 1355 (9th Cir. 1995). As for Transaero's reliance on *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988), there

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erroneously permitted to go to trial'"); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 448 (6th Cir. 1988); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) (interlocutory appeal allowed "to obtain an authoritative determination of [a foreign sovereign's] amenability to suit"); *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354 (9th Cir. 1988) (same).

[5] See *Transaero*, 30 F.3d at 149-50 (D.C. Cir. 1994) (challenge to personal jurisdiction); *Foremost-McKesson*, 905 F.2d at 442-43 (D.C. Cir. 1990) ("numerous challenges" to "both subject matter and personal jurisdiction" on interlocutory appeal); *Velidor v. L/P/G Benghazi*, 653 F.2d at 820-21 (3d Cir. 1981) (personal and subject matter jurisdiction); *Tubular Inspectors*, 977 F.2d at 182 (5th Cir. 1992); *Gould*, 853 F.2d at 448 (6th Cir. 1988) (personal and subject matter jurisdiction and venue).

was no statute in that case that granted immunity from suit in the absence of personal jurisdiction, while the Foreign Sovereign Immunities Act performs exactly that function here. Moreover, the Court explicitly ruled in *Biard* that, unlike this case, the immunity at issue was solely an immunity from judgment, not immunity from suit. See *id.* at 525; see also Petition for Writ of Certiorari ("Petition") at 10.

In short, the uniform rule prior to the Second Circuit's decision below was that federal courts have appellate jurisdiction to hear an interlocutory appeal involving a foreign sovereign's amenability to suit—including questions of personal jurisdiction. Issues that do not concern a foreign sovereign's amenability to suit—such as a requirement that a foreign sovereign post security, see *Drexel Burnham Lambert*, 12 F.3d at 323-24—cannot be raised on interlocutory appeal. The Second Circuit's decision to disregard the judgment of the D.C. Circuit and dismiss the Air Force's appeal creates a direct conflict with at least four other Circuits. This Court should grant certiorari to reaffirm the structure and purpose of the Foreign Sovereign Immunities Act and to resolve the conflict among the circuits.

3. For all its bluff assertions that interlocutory review is unavailable, Transaero *never* attempts to discuss the application of the three factor test set out in *Cohen*. Worse still, Transaero omits any mention of *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), in which this Court resolved a circuit conflict and held that interlocutory review is available from a denial of Eleventh Amendment immunity. See Petition at 12-14 (discussing *Cohen* and *Metcalf & Eddy*).

Instead of grappling with these cases, Transaero asserts that the petition should be denied because the Air Force initiated these proceedings. Brief at 2-3, 15. As the Air Force's Petition explains, however, in moving to vacate the default

judgment, the Air Force explicitly raised and preserved its jurisdictional defenses under the Foreign Sovereign Immunities Act, defenses which at that time were pending in the D.C. federal courts. See Petition at 4 & n.3, 30a-31a. Whatever the Court might ultimately conclude on this question, it is hard to see what bearing it has on the issue before this Court, *i.e.*, whether the Second Circuit had jurisdiction to hear an interlocutory appeal involving a foreign sovereign's amenability to suit under the Act.

Finally, Transaero attempts to make much of the statement by the Air Force's counsel in a prior brief that Transaero is free to refile its case, attempt proper service, and receive a hearing on its claims. See Brief at 14. But this is nothing more than what Congress intended when it adopted the Act. In order to obtain federal court jurisdiction over a foreign sovereign, private parties must comply strictly with the terms of the Act. Transaero admittedly has not done so and apparently believes, along with the Second Circuit, that these statutory service requirements are mere technicalities. To the contrary, this Court and Congress have said that the service requirements of the Foreign Sovereign Immunities Act have a substantive purpose. This Court should grant certiorari to protect and to revive that purpose.

CONCLUSION

As a foreign sovereign, the Bolivian Air Force is not amenable to suit in United States courts unless all the jurisdictional requirements of the Foreign Sovereign Immunities Act are met. The Air Force contends—and the D.C. Circuit agrees—that those requirements were not met here. The Eastern District of New York refused to follow the D.C. Circuit and, despite the fact that every other circuit to address the issue has held that interlocutory review of such a decision is available, the Second Circuit has refused to hear the Air Force's appeal.

For the reasons stated above and in the petition, certiorari should be granted and the decision of the Second Circuit should be summarily reversed.

Respectfully submitted,

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